Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)

HIGH COURT (KUALA LUMPUR) — SUIT NO D21 NCC-19 OF 2010
VARGHESE GEORGE JC
24 NOVEMBER 2010

Civil Procedure — Government proceedings — Injunction — Grant of interim injunction against government — Whether interlocutory injunctions may be granted against government in appropriate cases — Government Proceedings Act 1956 s 29

Civil Procedure — Injunction — Interlocutory injunction — Injunction to restrain defendant from claiming under performance bond — Termination of construction contract by defendant due to delay in completion by plaintiff contractor — Whether unconscionable for defendant to claim under performance bond — Whether restraining orders may be granted on grounds of unconscionability

Contract — Guarantee — Performance bond — Interlocutory injunction to restrain defendant from claiming under performance bond — Termination of construction contract by defendant due to delay in completion by plaintiff contractor — Whether unconscionable for defendant to claim under performance bond — Whether restraining orders may be granted on grounds of unconscionability

The plaintiff was the main contractor of a highway construction project. As a requirement of the award of the contract by the defendant, the plaintiff had posted two bonds with the defendant as the beneficiary of the sums guaranteed therein. The bonds were a performance bond and an advance payment bond, both of which were issued by Bank Islam Malaysia Bhd ('BIMB'). The original completion date of the contracted works undertaken by the plaintiff was stipulated to be 11 December 2009. The defendant however had granted to the plaintiff two extensions of time; the first for three months, from 11 December 2009 to 11 March 2010, and the second from 11 March 2010 to 11 March 2011. On 11 May 2010 the defendant nevertheless proceeded to issue a notice of termination of the contract on the grounds that the plaintiff had suspended all works on site since October 2009 and it was anticipated that the plaintiff would not be able to complete the works by 11 March 2011. Further the level of completion should have reached 50.20% of the total works but what had

been achieved was only 35.40%. This failure on the part of the plaintiff had continued to occur despite notice of intention issued by the defendant to terminate the contract. It was common ground that both the bonds were 'on demand' or 'unconditional' bonds/guarantees. The plaintiff applied vide summons in chambers (encl 3) for the following orders: (a) an order restraining the defendant from parting with any sums received from BIMB under the two bonds, until disposal of an arbitration proceedings or further order of the court; (b) alternatively an order directing the defendant to refund to BIMB any sum received from BIMB under the two bonds; or (c) further alternatively, an order directing the defendant to retain any sum already received in an interest bearing account until disposal of the arbitration or further order of the court. The plaintiff claimed that there was 'unconscionable' conduct on the part of the defendant which justified the granting of the orders. Another issue which arose for consideration was whether an injunction or restraining order as applied for could lie against the government in view of the restrictions found in s 29(1)(a) of the Government Proceedings Act 1956.

Held, dismissing encl 3 with costs:

(1) The sole basis for the plaintiff's application for the intervention of the court was on the grounds that the demand made by the defendant on BIMB was 'unconscionably' made and/or the defendant's conduct was tainted with 'unconscionability'. Our courts have recognised the principle of law that 'unconscionability' is an additional exception or separate ground for the courts to intervene and allow restraining orders where the interest of justice require it be done (see paras 16 & 23).

(2) On the totality of evidence, a case on 'unconscionability' in respect of the demand issued by the defendant or of the conduct of the defendant had not been made out for the court to make any restraining order as applied for by the plaintiff. Whether the termination by the defendant was proper or wrongful was for another forum to determine. There was nothing to indicate 'unconscionability' on the part of the defendant in taking the contractual action they were entitled to as was done here (see paras 27 & 29(b)).

(3) While there may be a case to allow interlocutory injunctions against the government in appropriate cases, it should be restricted to only where it is obvious and clear that the government's discharge of public duties are not interfered with in any way. A restraining order as applied for here, if issued, will interfere with the 'public duty' or 'public element' of the defendant's role and obligations on the road project (see paras 36–37).

[Bahasa Malaysia summary

Plaintif merupakan kontraktor utama suatu projek pembinaan lebuh raya. Sebagai syarat kepada pemberian kontrak oleh defendan, plaintif telah

menyerahkan dua bon kepada defendan sebagai benefisiari bagi jumlah yang telah dijamin. Bon-bon tersebut merupakan bon prestasi dan bon bayaran pendahuluan, kedua-duanya dikeluarkan oleh Bank Islam Malaysia Bhd ('BIMB'). Tarikh asal penyempurnaan kerja-kerja yang telah dikontrakkan dan dilaksanakan oleh plaintif dijangka pada 11 Disember 2009. Defendan, walau bagaimanapun telah memberikan plaintif dua lanjutan masa, kali pertama selama tiga bulan, dari 11 Disember 2009 hingga 11 Mac 2010 dan kali kedua dari 11 Mac 2010 hingga 11 Mac 2011. Pada 11 Mei 2010 defendan walau bagaimanapun meneruskan mengeluarkan notis penamatan kontrak atas dasar bahawa plaintif telah memberhentikan semua kerja di tapak pembinaan sejak Oktober 2009 dan dijangkakan plaintif tidak boleh menyiapkan kerja-kerja pada 11 Mac 2011. Seterusnya, tahap penyiapan seharusnya mencapai 50.20% daripada keseluruhan kerja tetapi apa yang berjaya disiapkan hanyalah 35.40%. Kegagalan di pihak plaintif ini berterusan walaupun notis niat telah dikeluarkan oleh defendan untuk menamatkan kontrak tersebut. Adalah menjadi titik persamaan bahawa kedua-dua bon tersebut merupakan bon/jaminan 'atas permintaan' atau 'tidak bersyarat'. Plaintif memohon menerusi saman dalam kamar (lampiran 3) bagi perintah-perintah berikut: (a) suatu perintah menghalang defendan daripada melepaskan apa-apa jumlah wang yang diterima daripada BIMB di bawah dua bon tersebut, sehinggalah penyelesaian muktamad prosiding timbang tara atau perintah selanjutnya daripada mahkamah; (b) alternatifnya suatu perintah mengarahkan defendan memulangkan kepada BIMB apa-apa jumlah yang diterima daripada BIMB di bawah dua bon tersebut; atau (c) alternatif selanjutnya, suatu perintah mengarahkan defendan menyimpan apa-apa jumlah yang telah diterima di dalam akaun berfaedah sehingga penyelesaian muktamad timbang tara atau perintah selanjutnya daripada mahkamah. Plaintif mendakwa bahawa terdapat tindakan 'tidak berpatutan' di pihak defendan yang mewajarkan pemberian perintah-perintah tersebut. Satu lagi isu yang berbangkit untuk dipertimbangkan adalah sama ada suatu injunksi atau perintah larangan seperti yang dipohon boleh dibuat terhadap kerajaan berikutan sekatan-sekatan dalam s 29(1)(a) Akta Prosiding Kerajaan 1956.

Diputuskan, menolak lampiran 3 dengan kos:

(1) Satu-satunya dasar permohonan plaintif untuk mahkamah mencelah adalah atas dasar bahawa tuntutan yang dibuat oleh defendan terhadap BIMB dibuat secara 'tidak berpatutan' dan/atau tindakan defendan dicemari dengan 'ketidakpatutan'. Mahkamah mengiktiraf prinsip perundangan bahawa 'ketidakpatutan' merupakan pengecualian tambahan atau dasar yang berlainan bagi mahkamah-mahkamah mencelah dan membenarkan perintah-perintah larangan di mana kepentingan keadilan memerlukannya berbuat sebegitu (lihat perenggan 16 & 23).

(2) Dalam keseluruhan keterangan, kes tentang 'ketidakpatutan' berkaitan tuntutan yang dibuat defendan atau atas tindakan defendan tidak menghendaki mahkamah membuat sebarang perintah larangan seperti yang dipohon plaintif. Sama ada penamatan oleh defendan dibuat dengan betul atau salah, memerlukan forum yang lain untuk menentukannya. Tiada apa pun yang menunjukkan 'ketidakpatutan' di pihak defendan dalam mengambil tindakan kontraktual seperti yang telah mereka dilakukan (lihat perenggan 27 & 29(b)).

(3) Walaupun mungkin terdapat kes yang membenarkan injunksi-injunksi interlokutori terhadap kerajaan dalam kes-kes yang bersesuaian, ia harus dihadkan hanya apabila jelas dan nyata pelaksanaan kewajipan umum kerajaan tidak langsung diganggu. Suatu perintah larangan seperti yang dipohon ini, jika dikeluarkan, akan mengganggu 'kewajipan awam' atau 'elemen awam' bagi peranan dan kewajipan defendan dalam projek jalan raya tersebut (lihat perenggan 36–37).]

Notes

For cases on injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3112–3116.

For cases on interlocutory injunction, 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3544–3691.

For cases on performance bond, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4130–4146.

Cases referred to

Bocotra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733, CA (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Edward Owen Engineering Ltd v Barclays Bank International Ltd and another [1978] QB 159, CA (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149; [1995] 1 CLJ 283, SC (refd)

Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor [2009] 1 LNS 913, HC (refd)

Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kidenko Sdn Bhd & Anor [2007] 6 MLJ 72; [2007] 6 CLJ 18, CA (refd)

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1; [2003] 3 CLJ 378, CA (not folld)

Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd [1993] 3 SLR 350, HC (refd)

LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339; [2000] 3 CLJ 473, CA (refd)

Lim Kit Siang v United Engineers (M) Bhd & Ors [1987] 2 CLJ 195, SC (refd)
Nafas Abadi Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor [2004] MLJU 148, HC (refd)
Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor [2009] 8 MLJ 1; [2009] 6 CLJ 480, HC (refd)
Potton Homes Ltd v Coleman Contractors (Overseas) Ltd (1984) 28 BLR 19 (refd)
Radio & General Trading Co Sdn Bhd, The v Wayss & Freytag (M) Sdn Bhd [1998] 1 MLJ 346, HC (refd)
Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1991] 2 MLJ 229, HC (refd)
Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325; [2005] 2 CLJ 122, CA (not folld)
Satriadesa Corporation Sdn Bhd v Tenaga Nasional Bhd [2009] MLJU 1404; [2010] 4 CLJ 877, HC (refd)
Smith and others v Inner London Education Authority [1978] 1 All ER 411, CA (refd)
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd [2010] 1 LNS 1355, HC (refd)
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)
Tengku Haji Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105, HC (not folld)

Legislation referred to

Government Proceedings Act 1956 s 29, 29(1)(a)
Specific Relief Act 1950 s 54, 54(d)

Sanjay Mohan (K Govinard with him) (Kadir Andri & Partners) for the plaintiff/applicant.
Zetty Zurina bt Kamaruddin (Senior Federal Counsel, Attorney General's Chambers) for the defendant/respondent.

Varghese George JC:

[1] On 17 September 2010 I had delivered my decision on encl 3 in this action and stated in broad terms the grounds for my decision. I reserved the right then to issue a more complete grounds of decision, which I do now.

[2] The plaintiff was the main contractor of an highway construction project known as 'Projek Lebuhraya Pantai Timur Fasa 2 Pakej 3 dari CH 26100 to CH 40038, in Daerah Kemaman, Terengganu' for an original contract value of RM169,232,896.75. As a requirement of the award of the contract by the

defendant, the plaintiff had submitted or posted two bonds where the defendant was the named beneficiary of the sums guaranteed therein. The bonds were:

(a) a *performance bond* ('bon perlaksanaan kontrak kerja') in the sum of RM8,461,645 dated 17 July 2007; and

(b) an *advance payment bond* ('jaminan bank untuk bayaran pendahuluan') in the sum of RM10,000,000 also dated 17 July 2007,

both of which were issued by Bank Islam Malaysia Bhd ('BIMB').

[3] Enclosure 3 was the summons in chambers application of the plaintiff for interlocutory restraining orders. By the time the application came up for hearing however, the plaintiff was only seeking:

(a) an order restraining the defendant from parting with any sums received by the defendant from BIMB consequent to demands that had been made by the defendant under the terms of the two bonds from the BIMB — until disposal of an arbitration proceedings or further order of the court;

(b) alternatively an order directing the defendant to refund to BIMB any sum received from BIMB under the two bonds; or

(c) further alternatively, an order directing the defendant to retain any sum already received in an interest bearing account with BIMB until disposal of the arbitration or further order of this court.

[4] Enclosure 3 was heard inter parte and pending the decision on the plaintiff's application therein, an ad interim order was put in place pursuant to the order of court initially made on 31 May 2010 and extended from time to time.

[5] The original completion date of the contracted works undertaken by the plaintiff was stipulated to be 11 December 2009. The defendant however had granted to the plaintiff two extensions of time; the first for three months from 11 December 2009 to 11 March 2010 and the second from 11 March 2010 to 11 March 2011.

[6] On 11 May 2010 the defendant nevertheless proceeded to issue a notice of termination of the contract. It is material to take note of the reason stated for the termination of the plaintiff's contract. It was stated as follows:

> Dukacita diperhatikan bahawa tuan masih menggantungkan kerja ditapak sejak Oktober 2009 hingga ke tarikh surat ini dan kerja tuan dijangka tidak dapat disiapkan pada tarikh siap kerja yang telah ditentukan pada 11.03.2011. Kerja tuan sepatutnya sudah mencapai 50.20% siap tetapi kemajuan yang dicapai setakat ini

hanya 35.40%. Kegagalan tuan itu masih berulang sungguhpun tuan telah diberi Notis untuk Tujuan Penamatan Pengambilan Kerja Kontraktor seperti yang tersebut di atas.

[7] Essentially the defendant's basis for termination of the contract, as could be surmised from the above stated reason, was that the plaintiff had suspended all works on site since October 2009 and it was anticipated that the plaintiff would not be able to complete the works by the set completion date of 11 March 2011. Further the level of completion to date should have reached 50.20% of the total works but what had been achieved was only 35.40%. This failure on the part of the plaintiff had continued to occur despite notice of intention issued by the defendant to terminate the contract.

[8] The plaintiff by letter of 14 May 2010 had proceeded to challenge the termination of the contract by the defendant and had given notice to refer the dispute as to the legality of the termination to arbitration as provided for in the terms of the contract between the parties.

[9] The terms of the contract between the plaintiff and the defendant were in this case embodied in the standard form JKR 203A contract. One of the provisions in the contract was cl 53 which provided for a 'price escalation' (*turun naik harga*) mechanism to operate between the parties. By an addendum to the contract, five specific materials/items used in the construction were originally identified to be subject to the price variation mechanism should there be an increase in the market price for those identified materials. The five items were cement, steel, diesoline, fuel oil and bitumen.

[10] The plaintiff alleges that the principal cause for the delay in completion of the contracted works being undertaken by the plaintiff was the increase in price of materials encountered from the outset of the contract. The plaintiff also alleges that the impact of the price increase of materials was somewhat acknowledged by the defendant who by a circular *SPP Bil 3 Tahun 2008 dated 6 August 2008* ('the circular') had increased the number of materials/items covered by the price escalation clause from the original five items to eleven items.

[11] It was pointed out by the plaintiff that the circular however imposed two conditions, namely, that any contract price adjustment recognising the additional materials/items would be effective as of 1 January 2008 only (namely for works carried out after that date) and the contractor, if they were not still satisfied, could opt for a mutual termination of the contract, in which event, 50% value of the existing bonds would be subject to forfeiture. It was clear to me that the plaintiff was not happy with the terms and wanted the adjustments to be effective from the commencement of the contract and also

for further additional material/items to be added to the approved eleven materials/items used in the contract. The supplemental agreement proposed in the circular to be executed by the parties, if the terms of the circular were acceptable, were in the event not entered into by the plaintiff.

[12] What then transpired was that the defendant on 20 October 2009 alluding to the plaintiff's intention to mutually terminate the contract forwarded to the plaintiff a draft of a mutual termination agreement (*borang penamatan perjanjian bersama*). The plaintiff did not also execute this agreement citing contradictions with certain terms of the circular.

PERFORMANCE BOND/ADVANCE PAYMENT BOND ON DEMAND GUARANTEES

[13] It was *common ground between the parties* that the performance bond and advance payment bond were in this case *'on demand' or 'unconditional' bonds/guarantees*. BIMB was obliged to pay the defendant as beneficiary the sums guaranteed as per the terms of the bonds upon a demand simpliciter by the defendant, without in any way being constrained by any protest or contest by the plaintiff or any third party.

[14] The law on this point is well settled based on a long line of decided authorities of higher courts in our jurisdiction and in other common law jurisdictions (see *Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kidenko Sdn Bhd & Anor* [2007] 6 MLJ 72; [2007] 6 CLJ 18 (CA); *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283 (SC); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 (FC) and *Edward Owen Engineering Ltd v Barclays Bank International Ltd and another* [1978] QB 159).

[15] The only exception recognised to the strict obligations to pay when a demand is made on an on demand or unconditional bond or guarantee (and/or the beneficiary receiving the sum guaranteed) has been said to be where fraud was established on evidence before the court and where such fraud had been brought to the notice of the bank or issuer of the bond/guarantee (see *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339; [2000] 3 CLJ 473 (CA) and *Edward Owen Engineering*).

[16] The plaintiff's contention *was not* that the demand in the context of this case here was tainted with *fraud*. The sole basis for the plaintiff's application for the intervention of the court in this instant case was on the grounds that the

demand made by the defendant on BIMB was 'unconscionably' made and/or the defendant's conduct was tainted with 'unconscionability'.

[17] Unconscionability', it was argued by the plaintiff, was an independent and separate exception (that is, in addition to the exception of 'fraud') that should be recognised in law to forestall payment being made to the beneficiary by a bank or issuer of bonds or guarantees of the on demand/unconditional class.

[18] As support for his contention, counsel for the plaintiff relied on the Singapore Court of Appeal decision in *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733. There Karthigesu JA (after making reference to Eveleigh LJ in *Potton Homes Ltd v Coleman Contractors (Overseas) Ltd* (1984) 28 BLR 19, LP Thean J (as he then was) in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1991] 2 MLJ 229 and GP Selvam JC (as he then was) in *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 3 SLR 350) said:

> In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payments or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of 'balance of convenience'.

[19] This principle had been followed in several other cases in Singapore.

[20] The law in our jurisdiction might not be clear on 'unconscionability' as a separate exception to the strict obligation to pay or receive monies when it involves on demand/unconditional bonds or guarantees. There has been some resistance to extend the position in Singapore laid out in *Bocotra*'s case to our shores.

[21] This is often attributed to one sentence in our Court of Appeal decision in *LEC Contractors*, which reads:

> Bad faith or unconscionable conduct by itself is not fraud.

[22] As I have noted in another decision of mine (*Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2010] 1 LNS 1355), our Court of Appeal may appear at first glance by that sentence to be averse to 'unconscionability' being received or adopted here as a distinct ground for the court's intervention. However I would beg to state, on a full reading of that decision, that the focus of the learned judges appear to be on what constituted or did not constitute 'fraud' and whether it was pleaded in that particular case. As is accepted in law, 'fraud' would no doubt encompass

some element of 'criminality' or deceit. 'Unconscionability' on the other hand, would not necessarily always amount to 'criminal' acts. I am of the view that there is no justification, in principle or policy, why the same assistance of the court should be withheld from a party who approaches the court for intervention on the grounds of 'unconscionability' or mala fide acts on the part of the beneficiary, which if refused, could result in similar or more severe damage and loss to the aggrieved party as would happen in a 'fraud' context.

[23] This issue has been considered by our courts more specifically and the following are some of the decisions of our High Court which have recognised, if not applied, this principle of law that 'unconscionability' is an additional exception or separate ground for the courts to intervene and allow restraining orders where the interest of justice require it be done:

(a) *Nafas Abadi Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor* [2004] MLJU 148 (Suriyadi J, Shah Alam High Court);

(b) *The Radio & General Trading Co Sdn Bhd v Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346 (Kamalanathan Ratnam JC);

(c) *Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor* [2009] 8 MLJ 1; [2009] 6 CLJ 480 (Mohd Hishamuddin J); and

(d) *Satriadesa Corporation Sdn Bhd v Tenaga Nasional Bhd* [2009] MLJU 1404; [2010] 4 CLJ 877 (Prasad S Abraham JC).

[24] In addition to the above Malaysian decisions, I make reference also to the recent decision of Mohamad Ariff J in *Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor* (now reported in [2009] 1 LNS 913), where His Lordship made the following observation:

> The Singapore Court of Appeal in *Bocotra* … accepted the legal position that the court will grant an interlocutory injunction restraining a beneficiary from calling on the bond on the ground of fraud *or* unconscionability …
>
> In my view, the judicial and extra judicial views expressed in Singapore accord with good commercial sense, and unless precluded by higher authority and doctrine of precedents, I am of the opinion that this view point should be followed and adopted in Malaysia.

[25] In *Pasukhas Construction* case Mohd Hishamudin Yunus J (as he then was) acknowledged the merits of recognising this further exception of 'unconscionability' as a separate and distinct one but felt constrained by binding precedent not to adopt the same. His Lordship's comments were as follows:

> In the light of *Esso Petroleum Malaysia Inc* and *LEC Contractors*, I am not at liberty to apply the unconscionability principle as propounded by the Singapore Court of Appeal case of *Bocotra Construction* — although some of our High Court decisions that I have mentioned above have applied that principle. *Bocotra Construction*, being a decision of the Court of Appeal of Singapore is a persuasive authority; and the principle of unconscionability that it enunciated appears to me to be a sound principle. But, regrettably, I am bound by the doctrine of binding precedents. I am bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* (which applied the *American Cynamid* principles) or alternatively, by the Court of Appeal in *LEC Contractors* (which applied the fraud test).

[26] As noted further in my decision in *Sumatec Engineering and Construction* there, which I reproduce here:

> I am of the view that where a demand is made by a beneficiary in respect of an unconditional guarantee or bond, the development of law should be in the direction of recognising and accepting 'unconscionability' surrounding the demand or conduct of the party making the demand — as a further ground for intervention by the courts (in addition to the exception of 'fraud') to issue restraining orders in appropriate cases. Equity should come in and be unrestricted where the facts and circumstances require it to come to the aid of a party seeking justice.
>
> The availability of this further exception as an independent and separate one apart from fraud, however in my view, should be with one 'caveat', namely that there be placed before the court manifest or strong evidence of some degree in respect of the alleged 'unconscionable' circumstances or demand and not a bare statement or claim. However on the other hand it should not be too stringent and high as well, so as to stultify the equitable jurisdiction of the court as observed by Mohamed Ariff J, in *Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor*. This additional exception should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[27] Having said that, although I was inclined to accept the additional exception of 'unconscionability' as a sound principle of law in our jurisdiction, I was not however persuaded or satisfied that on the totality of evidence (placed here by affidavit) before me, a case on 'unconscionability' in respect of the demand issued by the defendant or of the conduct of the defendant had been made out for the court to make any restraining order as applied for by the plaintiff.

[28] The plaintiff raised various issues in support of their allegation that the demand of the defendant was unconscionable. I have considered the explanation and rebuttals of senior federal counsel ('SFC') for the defendant, to these ground relied upon by the plaintiff. It was the SFC's submission that in considering whether any one of the grounds cited or collectively all of the said grounds amounted to 'unconscionability', the court should also address the

issue by asking the question whether there has been any 'bad faith' on the part of the defendant behind the demand or the conduct overall of the defendant under the contract or in respect of the two bonds if at all.

[29] Counsel for the plaintiff raised essentially four matters which he alleged constituted 'unconscionable' conduct on the part of the defendant. They were:

(a) *The effect of price escalation of construction materials encountered during the currency of the contract which to some extent had been acknowledged by the defendant by the subsequent issue of the circular*.

In my assessment this is a contractual matter, in that the plaintiff well knew and accepted that price escalation mechanism would only be available in respect of five items when it entered into the contract. In response to appeals, the defendant agreed by the circular to increase the affected items to eleven and this variation was already a concession given in good faith by the defendant. There is no basis to taint the conduct of the defendant in this respect or to treat the fact of increase in the construction materials/items as satisfying the test of 'unconscionability'.

(b) *There was still another year to go (pursuant to the second extention of time) for the contract to be completed and parties were still engaged in discussions when the contract was terminated and the demand on the bonds made*.

In my assessment, the answer to this grievance lies in the reason cited by the defendant in the termination letter as reproduced earlier in this judgment. The road construction works were at a standstill despite notices of intention to terminate contract had been given to the plaintiff. There were no dispute raised as to the contentions of the defendant in respect of the status or progress of the works. Whether the termination by the defendant was proper or wrongful is for another forum to determine. There was nothing to indicate 'unconscionability' on the part of the defendant in taking the contractual action they were entitled to as was done here.

(c) *The terms of the supplemental agreement in respect of variation of price and/or the mutual termination agreement was onerous on the plaintiff and in any event was not consistent to the circular or as between them*.

I did not find that the mutual termination agreement tendered to the plaintiff departed from or were in conflict with the matters set out in the circular. I accept the learned SFC's submission thereto that on a proper reading of the relevant cll 2.1 and 7.1, the total forfeiture of the value of the bonds would only apply if terms of that agreement were not complied with by the plaintiff, for example if all drawings were not returned by the plaintiff upon the termination. The plaintiff would be paid for all work carried out upon proof of work done prior to the supplemental agreement being entered into. The 50% forfeiture of the value of the bonds if the contract was mutually put at an end

was consistent with the terms set out in the circular and was necessary to meet expenses of retendering the contract and the increased costs incurred to complete the works.

It must be borne in mind that it was the plaintiff who had not agreed to the revision of the terms of contract by refusing to sign the supplemental agreement. I did not find anything 'unconscionable' in the actions of the defendant. To the contrary, I considered the defendant's conduct over the relevant span of time to be fair and more than reasonable to the plaintiff.

(d) *The letter issued by the defendant to 'blacklist' the plaintiff illustrated a continuous unconscionable conduct of the defendant which was tantamount to exerting 'economic duress' on the plaintiff.*

The alleged letter was only issued by the defendant after the contract had been terminated and subsequent to the demand on the bonds being made. This was an administrative step taken in all cases of contractors who have defaulted. I could not understand how this step by the defendant after the demand on the bonds had been made and the contact terminated could taint the conduct or the demand of the defendant as an unconscionable act. No nexus with any past acts was shown for it to be even remotedly treated as 'continuous' harassment on the plaintiff.

[30] That aforesaid conclusion I have reached should dispose of this action. However if I should be held to be wrong in my approach and/or the conclusion reached as above, the next question that arises for consideration is whether an injunction or restraining order as applied for could lie against the government in the first place. This calls for consideration the extent of the restrictions found in s 29(1)(a) of the Government Proceedings Act 1956 either by itself or read together with s 54(d) of the Specific Relief Act 1950.

[31] Our law recognises a distinction between temporary injunction and perpetual injunctions that many be issued by the court (see the Specific Relief Act 1950). Judicial views are however divided as to whether a temporary injunction or as is commonly referred to, an interlocutory injunction (pending disposal of a substantive suit or arbitration) as opposed to a permanent injunction can be issued against the government, a department of the government or against officers or any related party to the government.

[32] The decisions of the Supreme Court in *Lim Kit Siang v United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195 and the recent judgment of the Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751 are cited as authority for the position in law that the courts discretion to grant

injunctions are limited statutorily and do not extend to granting injunctions against the government, regardless of whether the injunction sought is interim/interlocutory or permanent.

[33] On the other hand, the decision of our Court of Appeal in *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325; [2005] 2 CLJ 122 and the dicta found in the judgments of the Court of Appeal in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1; [2003] 3 CLJ 378 and of the High Court in *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 are relied on to argue that s 29 of the Government Proceedings Act 1956 does not prohibit the grant of a temporary or interlocutory injunction against the government.

[34] The plaintiff's arguments in this instant case was to the effect that a temporary injunction or interlocutory injunction should lie against the government and in any case, that the subject matter in question in this case was not to interfere with the public duties of any department or of the government. Counsel for the plaintiff's argued that the contract in this case was akin to a 'private contract' and was not caught by the limitation in s 54 of the Specific Relief Act 1950 as it did not involve a 'public duty'.

[35] The learned SFC's submission, on the other hand, was that the road works project was for the benefit of the *rakyat*. The money secured by the bonds were to go towards the costs of completing the project now necessitated by the appointment of another contractor. In any case, the monies guaranteed by the advance payment bond was the refund of the balance of monies already advanced by the defendant to the plaintiff at the commencement of the contract. The element of 'public duty' was therefore, it was argued — clearly discernable here as the beneficiaries of the road project was the general public. The learned SFC for the defendant also laid stress on the decision of the English Court of Appeal in *Smith and others v Inner London Education Authority* [1978] 1 All ER 411 that in any event where the defendant is a public authority performing duties to the public, one must look at the balance of convenience more widely and take into account the interest of the public in general to whom the duties are owed.

[36] While there may be a case to allow interlocutory injunctions against the government in appropriate cases on the rationale forcefully stated in *Sabil Mulia*, *Kekatong* and *Tengku Haji Jaafar*'s cases, I am inclined to restrict it to only where it is obvious and clear that the government's discharge of public duties are not interfered with in any way.

[37] After giving due consideration to the arguments of the respective counsel whether or not a 'public duty' would be interfered with or not in this

case I take the position and accordingly hold that a restraining order as applied for here, if issued, will interfere with the 'public duty' or 'public element' of the defendant's role and obligations on the road project.

[38] My conclusion therefore is that on all counts, the plaintiff failed in this application. I therefore dismissed encl 3 with costs and dissolved the ad interim order issued by me on 31 May 2010.

[39] After conferring with the respective counsel, I fixed the cost payable by the plaintiff to the defendant at RM7,500.

Enclosure 3 dismissed with costs.

Reported by Kanesh Sundrum